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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. KENDRICK JAMAR RUTH, Defendant and Appellant.	B289124 (Los Angeles County Super. Ct. No. NA105943)

APPEAL from a judgment of the Superior Court of Los Angeles County, Judith L. Meyer, Judge. Conditionally reversed in part and remanded with directions.

Renee Rich and James M. Crawford, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr. and Allison H. Chung, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

A jury convicted defendant and appellant Kendrick Jamar Ruth of elder adult abuse likely to produce great bodily harm or death (Pen. Code, § 368, subd. (b)(1))[1] and found that his victim was 70 years of age or older and suffered great bodily injury (§ 368, subd. (b)(2)(B)). The jury further found that defendant suffered a prior conviction charged as a serious and/or violent felony under the Three Strikes law (§§ 667, subd. (d); 1170.12, subd. (b)) and as a serious felony (§ 667, subd. (a)(1)) and that he served two prior prison terms (§ 667.5, subd. (b)). The trial court sentenced defendant to state prison for 16 years.

On appeal, defendant contends the trial court erred in declining to hold a second competency hearing; remand is necessary to allow the court to exercise its discretion to strike his section 667, subdivision (a)(1) enhancement; remand is necessary to allow the court to determine whether he would benefit from mental health diversion under section 1001.36; clerical errors must be corrected; and remand is necessary so the court can determine defendant's ability to pay fines and assessments pursuant to *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*). We conditionally reverse defendant's elder abuse conviction and remand for a hearing to determine his eligibility for a mental health diversion program pursuant to section 1001.36. Depending on the trial court's resolution of that issue, the trial court is also to consider whether to exercise its section 1385 discretion to strike defendant's section 667, subdivision

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[1] All statutory citations are to the Penal Code unless otherwise noted.

(a)(1) enhancement and is to correct the clerical errors in the abstract of judgment.

II. BACKGROUND

At the time of his testimony on October 18, 2017, Luis Perez was 83 years old. On February 28, 2017, he was walking on the sidewalk along Willow Street in Long Beach when defendant walked about 10 or 15 steps past him. Defendant then turned around, approached Perez, and punched him in the head. The blow knocked Perez unconscious and he fell into the street.

Jesus Manrique, who witnessed defendant strike Perez, ran across the street to help Perez. Manrique and another person picked up Perez and moved him from the street. Andrew Williams, who also saw defendant strike Perez, also went to Perez's aid. Perez regained consciousness and was taken to the hospital. He experienced a lot of pain and had swelling on the top of his head. He was released from the hospital later that day.

III. DISCUSSION

A. *Competency Hearing*

Defendant contends the trial court abused its discretion when it declined to hold a second competency hearing. We disagree.

1. Background

On March 10, 2017, prior to trial, defense counsel declared a doubt about defendant's mental competence to stand trial pursuant to section 1368. The trial court suspended proceedings.

On April 3, 2017, the mental health court appointed Dr. Phani Tumu, pursuant to Evidence Code section 730, to examine defendant and prepare a report on defendant's mental status. Dr. Tumu interviewed defendant at the Twin Towers Correctional Facility on April 22, 2017, and prepared a report dated May 3, 2017, that he submitted to the mental health court.[2]

In the interview, defendant gave his correct age and date of birth to Dr. Tumu. Defendant said that he was not prescribed medications and had not taken them in the past. He denied having been previously psychiatrically hospitalized—he was housed on the psychiatric floor because his lawyer requested it—or having any psychiatric symptoms. He also denied using alcohol and/or illicit substances, although his legal history suggested otherwise.

Defendant told Dr. Tumu that he was "'accused of hitting someone.'" He had gone to the Long Beach court where he was told the charge was a misdemeanor. He pleaded not guilty and said he would take his case to trial as necessary. Defendant reported that a witness had told the police that defendant was not the perpetrator. Defendant would not consider a plea agreement because he "'didn't do anything.'" Defendant told Dr.

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[2] We granted the Attorney General's request to take judicial notice of the mental health court's case file in case number ZM035942 which contains Dr. Tumu's report.

Tumu that he would work with his public defender and described work the attorney was performing on his behalf.

In the "Mental Status Exam" section of his report, Dr. Tumu found: "No abnormal movements were noted; he made good eye contact. He was awake, alert and oriented. The defendant was calm and pleasant; he did not appear distracted by internal preoccupation. [His] speech was of a normal rate, spontaneous, with a normal latency to response. He was linear and goal-directed in his thought process. The defendant did not endorse auditory/visual hallucination and paranoid/grandiose delusions were not elicited. His mood was euthymic and his affect was constricted. His insight and judgment were impaired. His memory and concentration were intact."

In the "Presence (or Lack) of Mental Illness" section of his report, Dr. Tumu opined that defendant "more likely, than not, suffers from a substance use disorder." He noted defendant had been arrested for driving under the influence, possession of phencyclidine, public intoxication, possession of a narcotic substance, and possession of marijuana while driving.

Dr. Tumu stated that the use of alcohol can cause poor judgment and disinhibition and the use of stimulants can cause symptoms similar to a manic phase of Bipolar disorder. Methamphetamine use can cause psychotic symptoms like auditory hallucinations and paranoia. Phencyclidine use can cause significant maladaptive behavioral changes including belligerence, "assaultiveness," impulsivity, and/or impaired judgment. During the interview, defendant did not present with paranoid delusions or other psychotic symptoms like thought disorganization.

Dr. Tumu noted that defendant did not have a psychiatric history that pointed to a primary psychotic disorder. He concluded, "I am not convinced [defendant] suffers from a primary psychotic disorder because of his history of illicit substance use and lack of objective signs of a psychotic disorder during the interview."

In the "Competency to Stand Trial" section of his report, Dr. Tumu opined that defendant was competent to stand trial. Defendant understood the various courtroom personnel and their roles and the courtroom procedures. He knew there was a witness who might testify against him, but told Dr. Tumu that that witness (the alleged victim) had not identified him as the assailant. Defendant was unaware if there was any evidence in the case, but aware that any evidence and/or witnesses could be used against him if he went to trial. Defendant did not know the potential period of incarceration he faced if convicted, but insisted that he was not the assailant.

Dr. Tumu opined that defendant was not suffering from psychiatric symptoms that were inhibiting his decision-making process regarding "his current legal predicament." Defendant had the ability to rationally assist his attorney in this case. He was not suffering from psychotic symptoms such as thought disorganization or paranoia and was able to provide a linear history of himself. Defendant did not exhibit any symptoms of a psychiatric illness that would stop him from moving forward with this case or from working with his attorney. Dr. Tumu found that defendant's denial about the allegations in this case, in and of itself, was not due to psychosis.

On May 31, 2017, the mental health court found defendant mentally competent to stand trial. Defendant's bifurcated trial

began on October 17, 2017, and the jury rendered its guilty verdict on October 19, 2017.

Defendant was then tried on the prior conviction allegations. After the prosecution presented its case, defendant stated that he wanted to testify. The trial court asked defense counsel if he wanted to ask defendant questions or have him testify "in the narrative." Defense counsel opted for narrative testimony.

Testifying about an alleged driving under the influence of alcohol conviction, defendant said that he won $140 million in 2008 in the Super Lotto, but his family got together and took it from him. Defendant explained that his grandmother, who "was Chinese at the time," was the cashier who sold him the winning ticket.

Defendant's mother and father worked for the Long Beach Police Department and his "whole family" worked for the sheriff's department. They conspired with defendant's girlfriend to set him up for driving under the influence and succeeded in putting him in prison for two years. His family was trying to take his inheritance because he was the only survivor in the family. When defendant was released from prison, his grandfather and his uncle married defendant's wife "as one guy."

The trial court then asked defendant to address the other alleged prior conviction—an assault conviction. Defendant testified that "they" obtained an $800 million loan in 2008 of which they owed him 68 percent. Also, he just won $239 million in Mega Millions. He testified that Snoop Dogg was his father, Halle Berry was his mother, and Michael Jackson was his "military mother."

As to "this case," defendant testified that when he was at the hospital, "they" asked if he "wanted to do the doctor's time who killed Michael Jackson," but he declined. He added, "As of '09, Michael Jackson was 53 years old. That's my— [¶] . . . [¶] —case number. That's my—that's my—my booking number— [¶] . . . [¶] —for that case." Defendant said, "It was a set up."

The jury found true the prior conviction allegations. The trial court set defendant's sentencing hearing for November 16, 2017.

At the sentencing hearing, defense counsel declared a doubt as to defendant's competence based on defendant's testimony at the prior convictions trial and defendant's statements in subsequent telephone conversations with defense counsel. The trial court then had the following conversation with defendant:

"The Court: Let's just ask. Mr. Ruth, do you know what's going on today? Do you know what you're here for today.

"The Defendant: I think so.

"The Court: What is it?

"The Defendant: To finish the case.

"The Court: To finish the case. And by 'finish the case,' are you aware that the jury found you guilty on the case?

"The Defendant: I didn't hear all the—

"The Court: Are you aware that the jury found you guilty?

"The Defendant: I didn't hear all the—all the answers—I mean, all the decisions. I didn't hear all of them.

"The Court: You were here for court when they announced guilty, and then you were found guilty on the priors.

"The Defendant: They didn't let me testify.

"The Court: No. I did let you testify. I just stopped you in the middle of your testimony because you weren't testifying to some of the things that needed to go on.

"The Defendant: That was after—after the case.

"The Court: After the trial.

"The Defendant: I never got a chance to testify, and my witness didn't get a chance to testify either.

"The Court: That was an option that was offered up, and you chose not to testify at the time.

"The Defendant: No, I didn't. I didn't—I never got offered that.

"The Court: Yes, you did. I was here in court when it happened.

"The Defendant: I never got that offer."

The trial court asked defense counsel to approach for an ex parte discussion. At the conclusion of that discussion, the trial court stated that it was not prepared to declare a doubt, but was willing to continue the sentencing hearing to allow defense counsel "to order a psych report and have a doctor interview him." Defense counsel responded, "Perfect." After continuing the sentencing hearing to December 13, 2017, the trial court told defense counsel, "Fill out your medical order and he can be, evaluated by a doctor."

On defendant's request, the sentencing hearing was continued twice—once expressly to allow time to "gather[] mental health records in preparation for a motion for a new trial"—and held on March 29, 2018. At the sentencing hearing, defense counsel made an oral motion for a new trial asserting that defendant was not competent to stand trial as defendant stopped taking his psychotropic drugs causing him to decompensate

throughout the course of trial. Among other things, defense counsel referred to defendant's statements about Michael Jackson, Halle Berry, and winning the lottery. Defense counsel did not present any mental health reports. The trial court denied the motion for a new trial.

2. Analysis

"A defendant who is mentally incompetent cannot be tried or adjudged to punishment. (§ 1367, subd. (a); *Pate v. Robinson* (1966) 383 U.S. 375, 378 . . . .) A defendant is mentally incompetent to stand trial if, as a result of mental disorder or developmental disability, the defendant is 'unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner.' (§ 1367, subd. (a).) The defendant has the burden of proving incompetency by a preponderance of the evidence. (§ 1369, subd. (f); *People v. Medina* (1990) 51 Cal.3d 870, 881-886 . . . .)" (*People v. Marshall* (1997) 15 Cal.4th 1, 31 (*Marshall*).)

"When, as here, a competency hearing has already been held and the defendant was found to be competent to stand trial, a trial court is not required to conduct a second competency hearing unless 'it "is presented with a substantial change of circumstances or with new evidence"' that gives rise to a 'serious doubt' about the validity of the competency finding. [Citation.] More is required than just bizarre actions or statements by the defendant to raise a doubt of competency. [Citations.] In addition, a reviewing court generally gives great deference to a trial court's decision whether to hold a competency hearing. As we have said: '"An appellate court is in no position to appraise a

defendant's conduct in the trial court as indicating insanity, a calculated attempt to feign insanity and delay the proceedings, or sheer temper.'" [Citations.]" (*Marshall, supra,* 15 Cal.4th at p. 33.)

In *Marshall, supra,* 15 Cal.4th 1, the trial court held two hearings to determine the defendant's competency to stand trial. In the first hearing, a psychoanalyst opined that the defendant was not competent. The trial court ruled that the defendant failed to meet his burden of proving incompetence. (*Id.* at p. 29.) In the second hearing, the defense and prosecution presented competing witnesses on the defendant's competency. The jury found the defendant mentally competent to stand trial. (*Id.* at pp. 30-31.)

On appeal, the defendant argued the Supreme Court should reverse his conviction because the trial court did not, sua sponte, make a renewed inquiry into his mental competency during and after the trial after he made statements that raised reasonable doubts about his mental competency. (*Marshall, supra,* 15 Cal.4th at p. 32.) The defendant supported his argument with "certain unusual statements he made before jury selection about his having large amounts of money and being born in Spain; statements he made to the probation officer to the effect that he was a god, that the President and Governor were conspiring against him, and that the conspirators would be beheaded; and statements he made after trial about attorneys and other trial participants previously involved in his life, about the court's loss of its budget, and about himself being the victim of entrapment." (*Id.* at p. 33.)

The Supreme Court held that it could not say, as a matter of law, that the defendant's statements were a "'substantial

change of circumstances'" that required the trial court to hold a second competency hearing. (*Marshall, supra,* 15 Cal.4th. at p. 33.) It noted that a defendant's bizarre statements, standing alone, are not sufficient. (*Ibid.*) Accordingly, it concluded, the trial court did not abuse its discretion when it determined that the defendant's statements did not establish a substantial change of circumstances. (*Ibid.*)

Here, the trial court implicitly ruled that defendant's bizarre statements about, among other things, his lottery winnings, his family's conspiracy to imprison him to take his money, and his parentage did not establish a substantial change of circumstances or new evidence that gave rise to a serious doubt about the prior finding of defendant's competence. The trial court did not abuse its discretion. (*Marshall, supra,* 15 Cal.4th at p. 33.)

B. *Remand to Allow the Trial Court to Exercise Its Section 1385 Discretion to Strike Defendant's Section 667, Subdivision (a)(1) Enhancement*

Senate Bill No. 1393, which became effective on January 1, 2019, amended sections 667 and 1385 to give the trial court discretion to strike five-year sentence enhancements under section 667, subdivision (a) in furtherance of justice. Defendant contends that in light of Senate Bill No. 1393 we should remand this matter to the trial court to allow it to decide whether to strike his section 667, subdivision (a) enhancement. The Attorney General agrees as do we.

C. *Pretrial Diversion Hearing*

Defendant contends that he is entitled to a hearing on mental health diversion under recently enacted section 1001.36 because the Legislature intended the statute to apply retroactively. The Attorney General counters that the language of subdivisions (a), (b), and (c) of section 1001.36 demonstrates that the Legislature intended the enactment to operate prospectively, i.e., the enactment would not apply to cases such as this one in which there has already been an adjudication.

Our Supreme Court has granted review to decide whether section 1001.36 applies retroactively. (*People v. Frahs* (2018) 27 Cal.App.5th 784, review granted in S252220 (Dec. 27, 2018) (*Frahs*).[3]) Because our Supreme Court will soon have the final word, we will keep our discussion brief. We agree with the outcome in *Frahs*, and as in *Frahs*, defendant's case is not yet final on appeal and the record affirmatively discloses that he appears to meet at least one of section 1001.36's threshold eligibility requirements. We will therefore remand to allow the trial court to determine whether defendant should benefit from diversion under section 1001.36. (*Frahs, supra,* 27 Cal.App.5th at p. 791.)

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[3] See Cal. Rules of Court, rule 8.1115(e)(1) ["Pending review and filing of the Supreme Court's opinion, unless otherwise ordered by the Supreme Court . . . , a published opinion of a Court of Appeal in the matter has no binding or precedential effect, and may be cited for potentially persuasive value only"].)

D. *Clerical Errors*

Defendant asserts that the abstract of judgment must be modified because it inaccurately states that he was convicted by plea and lists an incorrect date of conviction. Further, he contends, the abstract of judgment and sentencing minute order must be corrected to reflect that he received a five-year sentence enhancement under section 368, subdivision (b)(2)(B),[4] rather than section 12022.7, subdivision (c), as he was neither charged with nor convicted of violating section 12022.7, subdivision (c). The Attorney General agrees the abstract of judgment should be modified to reflect that defendant was convicted by a jury and the correct date of conviction, but disagrees that defendant was not convicted of violating section 12022.7, subdivision (c).

The abstract of judgment states that defendant was convicted by plea on March 29, 2018. Instead, he was convicted by a jury on October 19, 2017. We order the abstract of judgment modified to correct these errors. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185 (*Mitchell*).)

The sentencing minute order and abstract of judgment state that the trial court imposed a five-year sentence enhancement under section 12022.7, subdivision (c). The amended information charged defendant with violating section 368, subdivision (b)(2) and section 12022.7, subdivision (a). It did not contain an allegation under section 12022.7, subdivision (c).

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[4] Section 368, subdivision (b)(2)(B) provides for a five-year sentencing enhancement if the "victim suffer[ed] great bodily injury, as defined in Section 12022.7" and the victim is 70 years of age or older.

Section 368, subdivision (b)(2)(B) focuses on the victim of elder abuse—whether the "victim suffer[ed] great bodily injury." Section 12022.7, subdivision (c) focuses on the perpetrator of elder abuse—whether the perpetrator "personally inflict[ed] great bodily injury." The verdict form the trial court provided to the jury tracked the language in section 368, subdivision (b)(2)(B), asking it to find whether Perez was "70 years and older" and "suffer[ed] great bodily injury." The jury was not asked to decide whether defendant "personally inflict[ed] great bodily injury." Accordingly, we order the sentencing minute order and abstract of judgment modified to reflect that defendant was sentenced to a five-year term under section 368, subdivision (b)(2)(B) and not section 12022.7, subdivision (c). (*Mitchell, supra,* 26 Cal.4th at p. 185.)

E. *Ability to Pay Fine and Assessments*

At defendant's sentencing hearing, the trial court imposed a $300 victim restitution fine (§ 1202.4, subd. (b)), a $30 criminal conviction assessment (Gov. Code, § 70373, subd. (a)), and a $40 court operations assessment (§ 1465.8, subd. (a)(1)). Defendant did not request a hearing to determine whether he was able to pay that fine and those assessments.

Relying on *Dueñas, supra,* 30 Cal.App.5th 1157, defendant contends the trial court erred in ordering him to pay a restitution fund fine and criminal conviction and court operations assessments without conducting a hearing on his ability to pay that fine and those assessments. He contends that we should remand so that the trial court can hold such a hearing. The Attorney General argues, among other things, that defendant has

forfeited this issue by failing to object to the imposition of the fine and assessments without an ability to pay hearing.

"Ordinarily, a criminal defendant who does not challenge an assertedly erroneous ruling of the trial court in that court has forfeited his or her right to raise the claim on appeal." (*In re Sheena K.* (2007) 40 Cal.4th 875, 880.) This forfeiture doctrine applies where a defendant fails to object to the imposition of fines and fees at sentencing. (See, e.g., *People v. Aguilar* (2015) 60 Cal.4th 862, 864; *People v. Avila* (2009) 46 Cal.4th 680, 729.)

The record demonstrates that defendant is able to work. Although defendant was unemployed when the probation report was prepared, the report indicates a varied and apparently significant work history that includes: "computer network, computer technician, customer service, home business, laborer, network technician, office worker, phone sales, power technician; and service clerk." Further, defendant has been sentenced to 16 years in state prison, a term that should allow him to earn sufficient wages to satisfy his fine and assessments. Based on these particular facts, any error in failing to hold an ability to pay hearing was harmless beyond a reasonable doubt. (*People v. Johnson* (2019) 35 Cal.App.5th 134, 139-140.)

IV. DISPOSITION

The judgment is conditionally reversed and the matter is remanded to the trial court with directions to, within 90 days from the remittitur, conduct a diversion eligibility hearing under section 1001.36. If the trial court determines that defendant is not eligible for diversion, then the court shall reinstate the judgment.

If the trial court determines that defendant is eligible for diversion but, in exercising its discretion, the court further determines diversion is not appropriate under the circumstances, then the court shall reinstate the judgment.

If the trial court determines that defendant is eligible for diversion and, in exercising its discretion, the court further determines diversion is appropriate under the circumstances, then the court may grant diversion. If defendant successfully completes diversion, the court shall dismiss the charge in accordance with section 1001.36, subdivision (e). If, however, defendant does not successfully complete diversion, the trial court shall reinstate the judgment.

If the trial court determines that defendant is not eligible for diversion or is eligible but that diversion is not appropriate under the circumstances and reinstates the judgment or if the trial court grants diversion but defendant does not successfully complete diversion, then it is to consider whether to exercise its

discretion to strike defendant's section 667, subdivision (a)(1) enhancement under section 1385 and it is to modify the abstract of judgment as set forth above.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

KIM, J.

We concur:

RUBIN, P. J.

BAKER, J.